REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 7076/2015

In the matter between:

JVJ LOGISTICS (PTY) LTD	**APPLICANT**
And	
STANDARD BANK OF SOUTH AFRICA LTD	**1ST RESPONDENT**
THE SHERIFF OF THE HIGH COURT FOR THE DISTRICT OF INANDA	**2ND RESPONDENT**
ADRIAN VENGADESAN	**3RD RESPONDENT**

J U D G M E N T

Delivered on: FRIDAY, 22 JULY 2016

OLSEN J

[1] Section 133(1) of the Companies Act, 71 of 2008 (the "Act") provides for a general moratorium on legal proceedings against a company during business rescue. There are exceptions to the moratorium that do not feature in this case. In its material part s 133(1) reads as follows.

> "During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except - …"

A decision in the present application cannot be reached without first considering the proper construction of the phrase "lawfully in its possession" where it appears in s 133(1). The issue arises in the context of an assertion by the first respondent, Standard Bank of South Africa Limited, that it is entitled to repossess a Nissan motor vehicle currently possessed by the applicant, JVJ Logistics (Pty) Limited. Business rescue proceedings commenced in respect of the applicant. There is a dispute on the papers as to whether those proceedings continue, but, in the view I take of this matter, it is not one that needs be resolved. I proceed on the assumption that the applicant remains in business rescue.

THE FACTS AND THE RELIEF SOUGHT BY THE APPLICANT

[2] The relevant facts are not disputed. The applicant is a transport company. Its sole director and shareholder calls it a "micro enterprise". It has only one vehicle. It acquired possession of that vehicle under an instalment sale agreement concluded with the first respondent, in terms of which ownership of the vehicle was retained by the first respondent. The applicant fell into arrears with its instalments owed to the first respondent by a considerable margin, as a result of which the first respondent cancelled the instalment sale agreement and instituted proceedings against the applicant seeking an order confirming the validity of the cancellation and an order for the immediate return of the vehicle. Such orders were granted by this court on 27 March 2015. The applicant's business rescue commenced on 9 April 2015 following a resolution taken on 31 March 2015, and the third respondent, Mr. Adrian Vengadesan, was appointed on or about 30 April 2015 to oversee the company during business rescue.

[3] The third respondent prepared a business plan. (There is a dispute about whether it qualifies as such, but that issue need not be considered. I will call it a "business plan".) The business plan disclosed the existence of only two creditors, namely the South African Revenue Services and the first respondent. But the annexure to the plan which was designed to list creditors did not state how much each was owed. Nevertheless it is not disputed that the first respondent's support for the plan was necessary for its approval. Annexed to the plan was a set of documents incorporating an income statement and balance sheet which sought to account for the forecasted financial situation of the applicant under business rescue. In essence the motor vehicle owned by the first respondent was to comprise the capital of the company, and was put into the statements at a value of R900 000, which approximated the amount which would have been owing to the first respondent in terms of the instalment sale agreement if it had not been cancelled. The business plan was structured around the proposition that the applicant had managed to conclude a contract in terms of which it would use the vehicle to transport steel products around the country. (There is a dispute on the papers as to whether the terms of this contract were such as justified the financial forecast at the centre of the business plan. This issue need not be considered.) At the meeting called for the approval of the business plan the first respondent voted against it. There was an attempt on the part of the applicant to obtain more and better information in the hope that the first respondent could be persuaded to change its mind, but it would not relent. Instead the first respondent notified the applicant that it intended to have served and implemented what it called the "warrant of delivery" issued pursuant to the order of this court granted on 27 March 2015 directing the return of the motor vehicle to the first respondent.

[4] This last turn of events brought about the present application in which the applicant (supported by the third respondent), seeks an order in terms of s 153(1)(a)(ii) of the Act setting aside the vote of the first respondent against approval of the business plan on the ground that the vote was inappropriate; and an interdict restraining the service and implementation of the warrant

under which the motor vehicle would be seized and returned to the first respondent.

THE POWER OF THE COURT TO RESCIND OR VARY ITS ORDER OF 27 MARCH 2015

[5] The papers in this application are replete with allegations and counter-allegations concerning the qualities of the business rescue plan, whether business rescue had come to an end and, of course, whether it would be proper to classify the first respondent's rejection of the plan as inappropriate. Concerning the prayer for an interdict, all that was said in support of it in the founding papers was that service of the warrant was forbidden by s 133(1) of the Act. In its answering affidavit the first respondent took the line that the moratorium could not operate because business rescue had come to an end.

[6] The judgment pronounced by this court on 27 March 2015 was final and definitive with regard to the rights of the applicant and the first respondent to possession of the motor vehicle. The general principle concerning the effect of a final judgment was set out as follows in *Firestone South Africa (Proprietary) Limited v Genticuro AG* 1977 (4) SA 298 (A) at 306F-G.

> "The general principle, now well established in our law, is that, once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it. The reason is that it thereupon becomes *functus officio* : its jurisdiction in the case having been fully and finally exercised, its authority over the subject-matter has ceased."

(The established exceptions to the principle, dealt with thereafter in the *Firestone* judgment, do not require further attention.)

[7] The general principle enunciated in *Firestone* was endorsed in *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC) paras 22 – 29. The principle has since been considered and restated by the Constitutional Court on a number of occasions. (See inter alia *Ex Parte Minister of Social Development and*

Others 2006 (4) SA 309 (CC) paras 29 – 40; and *Cross-Border RTA v Central African Road Services* (Pty) Ltd 2015 (5) SA 370 (CC) paras 38 – 46.) Whilst the factual backgrounds to the judgments of the Constitutional Court referred to above were quite different to the one now under consideration, the principles remain the same.

[8] Once pronounced, the judgment of a court is enforceable according to its terms. Given the correct circumstances the judgment itself may be attacked, as occurs when it is sought to be rescinded, or becomes the subject of an appeal. But where, as here, the judgment is not questioned, but the right to enforce it is challenged, that may only be done on recognised grounds, such as that the judgment has been discharged or abandoned. Subject only to the power of the court to supervise and regulate execution (the ambit of which power depends on the nature of the execution sought to be levied), any order interfering with the right to execute must be carefully considered, as its effect if it is sought without proper grounds for the relief is a variation of the original judgment, a matter beyond the power of the court. In this case the interdict sought by the applicant is itself final and open ended, and would amount in its effect to a rescission of the order finally made by this court in March 2015. Given the context in which the interdict is sought, one could say that what the applicant really wanted, or needed, was an order varying the order of March 2015 by suspending it, or declaring it suspended by law, whilst business rescue is underway. (Such an order would leave open the question as to who would have the right to possession of the motor vehicle once business rescue terminates.)

[9] With these matters in mind counsel for the applicant was requested at the commencement of argument to consider the question as to whether this court had the power or jurisdiction in effect to vary its original order other than on the basis contended for in the answering affidavit, that s 133(1) of the Act constitutes a statutory injunction against the implementation or execution of the judgment under which the vehicle was to be restored to the possession of the first respondent. Counsel answered, correctly in my view, that if the applicant did not enjoy the protection of a moratorium imposed by s 133(1),

then the interdict sought could not be granted in any terms. Counsel conceded further that if the interdict could not be granted, the application to set aside the first respondent's vote against the business plan had also to fail, as the business plan was premised upon the proposition that the applicant could keep and use the motor vehicle against the will of its owner, the first respondent.

[10] In that context this court raised the question *mero motu* as to whether it could grant any of the relief sought by the applicant without first finding that the vehicle which the first respondent sought to recover was lawfully in the possession of the applicant, as contemplated by s 133(1) of the Act. It seems to me that where a question arises in the mind of the court, but not of the parties, as to whether in the first place the court has the jurisdiction or power to grant any relief sought, the court is obliged to raise the issue *mero motu*. That accords with what was said by Ngcobo J in para 68 of the judgment of *CUSA v Tao Ying Metal Industries* 2009 (2) SA 204 (CC).

> "Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, *mero motu*, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality."

[11] As it turned out, at some stage after he had prepared his heads of argument, the problem had struck counsel for the first respondent as well, and he handed up a copy of the judgment of Tolmay J in *Madodza (Pty) Limited v ABSA Bank Limited and Others* [2012] ZAGPPHC 165 (15 August 2012). There the court was confronted with the same question, and decided that certain vehicles which had been the subjects of finance agreements which had been cancelled were not lawfully in the possession of the company in business rescue, as a result of which s 133(1) of the Act was not an obstruction to recovery of those vehicles.

[12] Given that counsel for the applicant had not previously considered the question, the parties were granted leave to file additional written argument on it. That has now been done.

THE CONTENTIONS OF THE PARTIES

[13] Counsel for the applicant has argued, with reference to *Cloete Murray and Another NNO v Firstrand Bank Limited t/a Wesbank* 2015 (3) SA 438 (SCA) that the execution or enforcement of the order of this court made in March 2015, prior to the commencement of business rescue, would amount to "enforcement action", as that term is employed in s 133(1) of the Act. In my view this submission is correct as far as it goes, and it is not contradicted by counsel for the first respondent. (See in this regard para 32 of the judgment in *Cloete Murray*.)

[14] Counsel for the applicant, citing both *Cloete Murray* and *Richter v ABSA Bank* 2015 (5) SA 57 (SCA) para 13, argues further that the net is cast so wide by s 133(1) of the Act that the enforcement action proposed by the first respondent must be hit by the moratorium as otherwise it would be within the power of the first respondent unilaterally to prevent the rescue of the company, contrary to the purpose of the Act. If counsel for the applicant is correct the questions arise immediately as to why:

(a) the word "lawfully" appears in the phrase "or lawfully in its possession" in s 133(1) of the Act;

(b) section 134(1)(c) of the Act deals with exercising rights in respect of property in the "lawful" possession of the company.

The argument advanced on behalf of the applicant offers no suggestions as to the meaning to be ascribed to the word "lawfully" where it appears in s 133(1), nor any argument beyond what I have already stated in support of the proposition that the word can simply be ignored. If counsel for the applicant is correct, then it must be concluded that the word "lawfully" where it appears in the two sections should be regarded as having been inserted through some "inadvertence or error", a conclusion which can only be drawn as a last resort to avoid insensibility or absurdity. (*Attorney-General, Transvaal v Additional*

Magistrate for Johannesburg 1924 AD 421 at 436.) The present case is no occasion for reaching that conclusion.

[15] Counsel for the first respondent relies exclusively on the decision in *Madodza*. Reading a little into para 17 of that judgment, one might say that the court concluded that the moratorium did not protect the company in business rescue because:

(a) the cancellation of the agreement terminated the right to possess; and

(b) the company had been ordered to return the vehicles.

Orders for the delivery of property are not made by the court unless it finds that the continued retention of the property by the defendant or respondent is unlawful as against the party claiming such relief.

INTERPRETING THE SECTION

[16] One would think that if any element of unlawfulness attaches to someone's possession of property, then such property cannot be said to be in the "lawful possession" of that person. However the temptation to regard that proposition as obvious and decisive of this case, and to close one's mind to other possibilities, must be sternly resisted especially when considering the meaning of the provisions of the Act dealing with business rescue. The approach to be followed in reaching a decision on the interpretation of the relevant words in s 133(1) of the Act is the one set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

> "Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is

> possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

[17] It is uncontentious that Chapter 6 of the Act constitutes an attempt to address the failings of the system of judicial management which prevailed before. The Companies Act of 2008 recasts the corporate landscape, which perhaps rendered the statement of its purposes in s 7 imperative. Section 7(k) states that one of the purposes of the Act is to -

> "provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders".
> (My emphasis)

Whilst sight should not be lost of the other purposes of the Act set out in s 7, that very much defines the context in which s 133(1) appears, and the apparent purpose to which it is directed. It also causes me to reflect, respectfully, along the lines that perhaps the court in *Cloete Murray* went too far in para 34 of the judgment, in accepting the proposition that the intention behind the moratorium is to "include any conceivable type of action against the company", unless that statement is seen only in the context of the distinction drawn in s 133(1) between legal proceedings against the company and legal proceedings in relation to property of or property lawfully possessed by the company. It is plain that an action in relation to property not lawfully in

the possession of the company can be maintained, notwithstanding the moratorium; the question being what is meant by the requirement that possession must be "lawful" for the moratorium to protect it.

[18] The context provided by the document within which the object of an interpretative exercise resides is obviously of substantial importance. Unfortunately, whilst s 7(k) of the Act speaks plainly to the purpose of business rescue, the provisions of the Act designed to establish and regulate the process speak far from plainly. Some provisions generate perplexity instead of enlightenment. In *African Banking Corporation of Botswana Limited v Kariba Furniture Manufacturers (Pty) Limited and Others* 2015 (5) SA 192 (SCA) para 43, Leach JA had this to say.

> "I do not believe it is unfair to comment that many of the provisions of the Act relating to business rescue, and s 153 in particular, were shoddily drafted and have given rise to considerable uncertainty."

The learned Judge went on to refer to an article by Dr A Loubser ("The Business Rescue Proceedings in the Companies Act of 2008: Concerns and Questions (Part 2)" : 2010 *TSAR* 689 at 700 – 701) where the learned author said the following.

> "It is therefore regrettable that the drafters of the provisions regulating the new rescue proceedings did not exercise more care in constructing the new procedure to avoid introducing principles and provisions that are completely foreign and even in conflict with our established law. … The many unclear, confusing and sometimes alarming provisions regulating the business rescue proceedings in the Companies Act of 2008 will certainly not assist in making the procedure more acceptable or successful."

[19] For the reasons stated immediately above the necessary exercise of reaching an understanding of any one provision which is consistent with the legislative framework as a whole is often not a simple one in the case of the business rescue provisions. Confronted with just such an interpretative

conundrum with regard to business rescue, the learned Judge who penned the judgment in *Endumeni* had the following to say in *Panamo Properties (Pty) Limited and Another v Nel and Others NNO* 2015 (5) SA 63 (SCA) para 27.

> "When a problem such as the present one arises the court must consider whether there is a sensible interpretation that can be given to the relevant provisions that will avoid anomalies. In doing so certain well-established principles of construction apply. The first is that the court will endeavour to give a meaning to every word and every section in the statute and not lightly construe any provision as having no practical effect. The second and most relevant for present purposes is that if the provisions of the statute that appear to conflict with one another are capable of being reconciled then they should be reconciled."

Thus driven, the court came to the conclusion that, despite the fact that s 129(5)(a) of the Act is to the effect that if certain procedural requirements are not met a resolution to begin business rescue "lapses and is a nullity", upon a proper construction of the provision in the context of the scheme of the Act the resolution does not so lapse and become a nullity; that is unless, and until, a court sets it aside after a further requirement, that it is just and equitable to do so, has been established. My respectful view is that the conclusion reached in *Panamo Properties* is correct. It is nevertheless undesirable that courts should have to explore the outer limits of the meanings of words in order to render a legislative scheme consistent, logical and rational.

[20] The interpretive exercise in this case is not free from the difficulties discussed above. The definition of "business rescue" in s 128(1)(b) of the Act must be reconciled with sections 133(1) and 134(1)(c) of the Act. Another example is s 134(3) which deals inter alia with a decision by a company to dispose of property over which another person has a "title interest", leaving the unfortunate reader to unravel the meaning of the term, and in particular to discern whether the ultimate form of title to property protected by our law – ownership - is intended to be regarded as a "title interest". The relationship between the moratorium imposed by s 133 of the Act, and the one for which

the business plan may make provision (see s 150(2)(b)(i)), is not spelt out. In addition to difficulties of this type, the outcome of one or the other interpretation must be assessed as to its outcome : is it sensible and businesslike : if it is carried to its logical conclusion, does it meet the apparent purpose of the legislation, including the achievement of a balance between the rights and interests of stakeholders whilst searching for the relief from financial distress which the company needs in order to survive.

CAN MERE FACTUAL POSSESSION MEET THE REQUIREMENTS OF s 133(1) ?

[21] Possession of corporeal property is a fact; or to put that more accurately, a coincidence of two facts: physical detention of the property coupled with the existence of an intention to possess or keep control of the thing. The fact of possession does not of itself speak to any right of the possessor to possess the property. In my view a consideration of the remedy of the *mandament van spolie* illustrates this.

[22] As the late Professor Silberberg pointed out in the first edition of his work *The Law of Property*, 1975 (at pages 72 – 73), the mere fact of possession generates a right which is generally referred to as the *jus possessionis.* The content of that right does not proceed beyond the right to the assistance of the courts to restore factual possession when dispossession against the will of the possessor takes place without the sanction of law. It is only to that extent that the spoliation remedy is a reflection of a right. It is not a right which is acquired from any person; it is automatically generated by a state of affairs – i.e. the fact that the property is possessed.

[23] In *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others* 2007 (6) SA 511 (SCA) para 21 Cameron JA had the following to say about the spoliation remedy.

> "Under it, anyone illicitly deprived of property is entitled to be restored to possession before anything else is debated or decided (*spoliatus*

> *ante omnia restituendus est*). Even an unlawful possessor – a fraud, a thief or a robber – is entitled to the *mandament's* protection. The principle is that illicit deprivation must be remedied before the Courts will decide competing claims to the object or property."

When the law protects mere factual possession it does not do so because of the lawfulness of the possession, but in order to address the unlawfulness of the deprivation of possession. Accordingly, the requirement of s 133(1) of the Act, that to enjoy the benefits of the moratorium against proceedings in respect of property possessed by a company, the possession should be "lawful", cannot be established merely by the fact that the company happens to possess the property at the time when business rescue commences. It is correct that the definition of "business rescue" in s 128 of the Act speaks of a moratorium protecting "possession" (ie without the qualification that it should be lawful), whilst the operative provisions (the one under consideration and s 134(1)(c)) address only the protection of lawful possession. To the extent that it may be said that there is a conflict it can only be resolved in favour of the operative provisions as, whilst they can be read consistently with the definition, the converse is not true if the word "possession" in the definition is read to encompass possession of any kind or origin.

TWO POTENTIAL MEANINGS

[24] It seems to me that there are two possible meanings to be ascribed to the word "lawfully" in s 133(1) of the Act. The first is wider than the second.

[25] The first, being the one adopted in *Madodza*, regards the affected company's possession of property as unlawful, and therefore not protected by s 133(1) of the Act, whenever the company lacks the so-called *jus possidendi*, which Professor Silberberg (*op cit*, page 72) described as "a right which justifies a person's claim to have a thing in his possession". A purchaser under a normal bank instalment agreement reserving ownership to the bank acquires a *jus possidendi* when put in possession of the property in terms of the agreement; and loses it if the agreement is cancelled. On this approach

the requirement of s 133(1) is that the company's possession should be lawful when judged from any perspective; or if not that, then lawful when judged from the perspective of any claim by a third party to possession of the property.

[26] The second possibility involves a distinction not unknown to our law between *iusta* and *iniusta* possession. Professor Silberberg (*op cit,* page 76) considered this distinction to be one between just and unjust possession. The learned authors of the 5th edition of his work (*Badenhoff, Pienaar and Mostert*, 2006) render the same distinction in English as one between lawful and unlawful possession. In both cases the examples of unjust or unlawful possession immediately dealt with are possession acquired by force or stealth (secretly). The learned authors of the 5th edition of the work add as a further example of unlawful possession that which is exercised "on sufferance as against the opponent". (See page 285). They accordingly equate the concept of lawful (or just) possession with possession *nec vi, nec clam, nec precario*, as those terms were used in s 2 of the repealed Prescription Act, 18 of 1943. (See also *LAWSA* : Vol.27 : 2ed : para 84.)

[27] From the moment that the contract relating to the vehicle between the applicant and the first respondent was cancelled, the former's possession of the vehicle was precarious, dependent as it was on the will of the first respondent as to whether it would or would not exercise its right to dispossess the applicant. Such precarious possession is a not uncommon occurrence in modern commercial relationships. I do not think that for that reason alone one can discard the proposition that the legislature required the protected form of possession to be "lawful" in the traditional sense of *iusta possessio*, so as to exclude from the ambit of the moratorium a claim to return of property if it had come into the possession of the company by force or stealth; i.e. the company fell within the range of examples of unlawful possessors given in *Tswelopele*, "a fraud, a thief or a robber".

[28] For the sake of convenient expression, I will refer to the wider concept dealt with in paragraph 25 above as "civil" unlawfulness; and to the narrower meaning canvassed in paragraphs 26 and 27 above as "criminal"

unlawfulness. These are mere convenient labels, and in using them I intend no detraction from nor any expansion of the scope of the concepts.

THE LANGUAGE OF THE PROVISION

[29] Possession which is unlawful in the criminal sense is possession unlawfully acquired, such as is the case when it is acquired by fraud or theft. If it was intended only to allow proceedings in relation to property unlawfully possessed in the criminal sense, then s 133(1) of the Act could have spoken to any property belonging to the company, or any other property of which it had lawfully acquired possession. The section instead says nothing about how possession must have been acquired (or must not have been acquired) in order to make its intention clear.

[30] Apart from the case of property the possession of which is unlawful in any circumstances (as to which see *Ngqukumba v Minister of Safety and Security* 2014 (5) SA 112 (CC)), the question as to whether possession is lawful arises inevitably when one person (usually the owner, or alleged owner) makes a claim for possession against a person currently in possession of the property. The issue then is as to whether the claimant has a right to possession which trumps that of the possessor, which would ordinarily occur because the possessor has no right to maintain possession at all. The action for possession would succeed if, as against the claimant, the retention of possession by the possessor is unlawful.

[31] Here, as against the first respondent, the applicant's possession of the vehicle in question is unlawful. In ordinary language, then, the vehicle is not "lawfully in [the applicant's] possession".

[32] In my view the failure of the legislature to employ language which would make it clear that the moratorium protects all except possession unlawful in the criminal sense favours the conclusion that the lawful possession addressed by the section must be lawful also in the civil sense if

the moratorium is to protect it. Nevertheless the section, read alone, can bear both meanings.

THE DURATION OF THE MORATORIUM

[33] The issue in this case must be affected to some extent by the answer to the question as to how long any moratorium endures. If possession can be maintained by a company in business rescue which has no defence otherwise to a claim by an owner for return of its property, the longer the period of dispossession of the owner endures, the greater the invasion of property rights which would be brought about by reason of the regime designed for the rescue of companies.

[34] It has been observed by our courts that business rescue proceedings are intended to be conducted speedily. (See, for instance, *Koen and Another v Wedgewood Village Golf and Country Estate (Pty) Limited and Others* 2012 (2) SA 378 (WCC) para 10, where the court observed that "it is axiomatic that business rescue proceedings, by their very nature, must be conducted with the maximum possible expedition.") In *AG Petzetakis International Holdings Limited v Petzetakis Africa (Pty) Limited and Others (Marley Pipe Systems (Pty) Limited and Another intervening)* 2012 (5) SA 515 (GSJ) para 29 the following was said.

> "Chapter 6 of the Companies Act demonstrates a legislative intention that rescue proceedings must be conducted reasonably speedily. The reason is obvious. Pending rescue proceedings temporarily protect the company concerned from legal proceedings by its creditors for the recovery of legitimate claims without any input of the creditors and remove the unfettered management of the company from the directors. Delays will extend the duration of these temporary statutory arrangements, of which the duration is restricted by way of the procedure prescribed by the Act. … If the time periods are added up, it appears that the protection of the company without the co-operation of the creditors from the time of a rescue order should not be more

than two to three months, even if there are many intervening non-business days."

Whilst it is correct that the moratorium imposed by s 133(1) of the Act is temporary, it appears not to be the case that its duration is intended to be confined to the period during which the necessary procedures are followed with a view to achieving an approved business plan. The opening words of s 133(1) are to the effect that the moratorium applies "during business rescue proceedings". When a business rescue plan has been adopted those business rescue proceedings will last until the supervising practitioner has filed "a notice of substantial implementation of that plan" (s 132(2)(c)(ii)). The moratorium is temporary, not because it is inevitably of short duration, but because it has a finite life.

[35] If the business rescue proceedings do not end within three months (or within such longer time as the court may allow) s 132(3) provides merely for the delivery of regular progress reports to all affected persons as well as either to the court or to the Commission. That provision, and the fact that there is no sanction against the duration of proceedings beyond three months, conveys that the legislation envisages business rescue proceedings enduring for such period as the plan itself may contemplate, the only check against ridiculous extensions of the life of such proceedings being that the plan must earn the requisite approval. Some business plans may in effect be implemented automatically and immediately upon adoption. (An example would be a plan which provides only for the partial release of a company from payment of its debts, because that is all that is required in order to rescue the business of the company from its financial distress, and its creditors are willing to approve such a scheme.) But where, as is the case here, the business plan contemplates the company trading out of its difficulties, the implementation of the plan (under the direction of the practitioner as required by s 152(5)(b) of the Act) is likely to take place over a relatively protracted period.

[36] Section 150 deals with what a business plan should contain. Section 150(2)(b)(i) requires the proposed plan to disclose "the nature and duration of any moratorium for which the business rescue plan makes provision". The implication of that provision must be that the moratorium imposed by s 133(1) of the Act can be modified or replaced by the business plan. Business rescue plans are likely to be as variable (subject to the limitation that what is proposed should be lawful) as the various circumstances which might give rise to and characterise a company's state of financial distress. During the life of the plan the moratorium for which s 133(1) provides, or such other or modified moratorium as the business plan may impose, will operate. It is difficult to see how any plan which contemplates a company trading out of its difficulties can be viable without the protection of a moratorium.

[37] I conclude that if the requirement for the operation of the moratorium is merely that the company's possession should not be criminally unlawful, the potential for a substantial period of operation of the moratorium imposed by s 133(1) of the Act suggests that the burden it would impose on the owner of property is too great to meet the requirement that there should be a balance of rights and interests as contemplated by s 7(k) of the Act. It should not be overlooked that if s 133(1) protects a company's civilly unlawful possession of another's property, it would be difficult to argue that a similar moratorium imposed by a business plan would not be enforceable. The business plan in this case seeks to do just that for a period of over three years.

THE RIGHTS OF OWNERS : DO THEY HAVE A VOICE?

[38] If the "lawful possession" contemplated by s133 (1) of the Act is any possession which is not unlawful in the criminal sense, then one would expect the provisions of the Act dealing with business rescue to reflect the requirement of s 7(k) that the owner's rights and interests should be balanced with those of all other relevant stakeholders. The principal provisions of the Act dealing with the rights of third parties who are not shareholders or employees are those relating to creditors. The word "creditors" is not defined in the Act.

[39] In insolvency proceedings, a person who has a claim against the estate not sounding in money can be regarded as a creditor for certain purposes. (See *Grobler v Grobler's Trustee* 1908 TS 423 at 437 – 438; *Ex Parte Vanqua* 1928 WLD 294; and *Mars : The Law of Insolvency in South Africa* 9 ed, page 372.) But the context there is quite different to the present one, as under insolvency law the trustee or liquidator would be bound to return property possessed but not owned by the insolvent, subject to the statutory provisions dealing with uncompleted transactions.

[40] One of the principal rights of a creditor is to vote when the Act provides for stakeholders to do so. A creditor is allocated a "voting interest". Section 145(4)(a) of the Act provides that the voting interest of a creditor is "equal to the value of the amount owed to that creditor by the company". Section 145(4)(b) deals with the special case of a creditor whose claim would be subordinated in a liquidation. In that case the claim would be "independently and expertly appraised" with a view to determining what would be realised by the creditor on liquidation, which amount would determine the creditor's voting interest.

[41] No provision is made for the quantification of the voting interest of a person whose property is possessed by the company without any right thereto vesting in the company. Nothing is said about such a person having a vote at all. That suggests strongly that such a person is not regarded as a creditor of a company in business rescue. It is inconsistent with the intention behind the Act that the rights of such an owner should be trampled upon by a moratorium in the same way as are those of creditors whose claims sound in money, but that only the latter should have decision-making rights and powers in connection especially with the formulation and adoption of a business plan.

PROTECTION OF PROPERTY INTERESTS

[42] If, upon a proper construction of s 133(1) of the Act, a company in business rescue is entitled to retain possession of any property when such

possession is unlawful in the civil sense, one would have thought that the regulation of the consequences of that would have been dealt with in s 134 of the Act which is headed "Protection of Property Interests". As already mentioned, s 134(1)(c) is a provision which deals pertinently with property not owned by the company but in its possession; but there, as in s 133(1), what is forbidden without the written consent of the supervising practitioner is the exercise of any right to property in the "lawful" possession of the company. This section takes the matter no further.

[43] In its perhaps negatively relevant provisions, s 134(3) provides as follows.

> "If, during a company's business rescue proceedings, the company wishes to dispose of any property over which another person has any security or title interest, the company must –
>
> (a) obtain the prior consent of that other person, unless the proceeds of the disposal would be sufficient to fully discharge the indebtedness protected by that person's security or title interest; and
> (b) promptly-
> (i) pay to that other person the sale proceeds attributable to that property up to the amount of the company's indebtedness to that other person; or
> (ii) provide security for the amount of those proceeds, to the reasonable satisfaction of that other person."

[44] Quite what is meant by the concept of "title interest" is perplexing. The word "title" is frequently used as a synonym for "ownership", or in connection with the phenomenon of ownership. The question arises as to why, if it is contemplated that a company in business rescue would be empowered to sell <u>any</u> property owned by another without the owner's permission, that was not stated in so many words. The proper interpretation of s 134(3) is of some importance in understanding the meaning of s 133(1) of the Act. It would not possible for a company to dispose of property not owned by it without the

permission of the owner, unless such property is in its possession. Delivery could not take place without the consent of the owner unless the company possesses the property. If s 134(3) sanctions the forced sale of any property owned by another, that would be an indicator, and perhaps a strong one, that the moratorium imposed by the Act extends to prevent the recovery of possession by an owner even where the company's possession is unlawful in the civil sense.

[45] Section 134(3) of the Act provides that without the prior consent of the so-called "other person" (i.e. the person with "any security or title interest" over the property), the sale and delivery (which is what the word "disposal" must indicate) can be executed if the proceeds would be sufficient to "discharge the indebtedness" protected by the person's "security or title interest". The section goes on to provide that there must be prompt payment to that other person from the proceeds of such a sale "up to the amount of the company's indebtedness to that other person". However, as between an owner of such property and the company there is no "indebtedness" owed to the owner merely because it is the owner. If one regards the section as authorising the sale of any property owned by another, then it is difficult to see how the sale proceeds "attributable to that property" must be paid only "up to the amount of the company's indebtedness to the other person". From where does the indebtedness spring? Surely, to the extent that the value of ownership can be reduced to money terms, whatever the sale proceeds attributable to the property may be, the full amount represents the owner's interest and entitlement. The value of property to an owner in money terms is the highest price offered which the owner is willing to accept.

[46] I conclude that the concept "title interest" is closely related to the concept of a "security interest". Each is an interest in specific property. An example of a security interest would be the interest of the holder of a notarial bond over movable property owned by the company. An example of a title interest is the interest of a seller of property to the company on credit, where ownership of the property is reserved to the credit grantor to protect itself against losses in the event of default by the company. In the latter case, for

so long as the contract between the seller and the company subsists, the seller's interest in the property lies in its title, which the seller is bound to surrender if the money owed to it under the contract is paid. The seller's reserved ownership provides security without the need for the seller to acquire a right in any property owned by the company. In that sense the seller has a "title interest" in the property, for so long as the contract which gave rise to it subsists. Section 133(3) allows such an existing contract to be unwound through the sale of the property against the wishes of the seller as long as the proceeds are sufficient to discharge the debt owed under the contract. But in my view if the contract is cancelled, insofar as the property itself is concerned, the seller is restored to its full rights as owner; its interest is no longer a mere "title interest". If, as in this case, the seller is entitled to have its possession of the property restored, that must be done. If, as is presumably the case here, the contract provided for what the seller/owner should do with its recovered property in order to determine the consequences of any breach of the agreement by the company, it is for the seller/owner to comply with those provisions which are designed to survive the cancellation of the contract. I accordingly conclude that the provisions of s 134(3) of the Act do not support the proposition that the moratorium provided by s 133(1) of the Act prevents recovery of property possessed by the company unlawfully in the civil sense. In reaching this conclusion I bring to account also that if s 133(1) does protect a company's unlawful (in the civil sense) possession of property, it does so indiscriminately. Its reach is not restricted to property of persons who have money claims against the company which relate to the company's possession of such property.

THE DIFFERENT INTERESTS OF AN OWNER DENIED POSSESSION AND A CREDITOR

[47] The interests of a company's creditors who are owed money, and a person whose property is in the possession of the company, are quite different. Inevitably the money claims of creditors are already compromised by the very financial distress which justifies the commencement of business rescue proceedings. The business rescue scheme allows the existing claims

of creditors to be diluted to such extent as is consistent with the ultimate aim of allowing the business of the company to be resuscitated. The position of the owner of property which is possessed unlawfully (in the civil sense) by the company is different. The claim to possession is unaffected by financial distress. The quality of the claim does not diminish by reason of the possessor's financial distress; just as it is not improved by the possessor's financial good fortune. If repossession is denied by s133 (1) of the Act, that prejudices the rights of the owner without any promise of improvement in the owner's rights such as is intended to flow to and for the benefit of creditors with money claims as a result of the adoption and implementation of a business rescue plan.

[48] A company in business rescue which is to continue with its business in terms of an approved plan has in effect the benefit of the capital provided by a full or partial moratorium on pre-existing debts already owed to creditors. If it requires more capital than that to execute the business plan that must be acquired from a financier, whether it be an existing creditor who sees advantage in providing it, or an outsider. In either event the capital can only be acquired consensually. Self evidently the provisions of a business plan cannot compel anyone to finance the business by providing additional capital. On the applicant's argument it is permissible for a company in business rescue simply to appropriate property unlawfully possessed by it (in the civil sense) for use as its own additional capital. (I call it capital as, if it surrendered possession to the owner, the company would have to acquire money from somewhere else to replace the thing which it requires to run its business.) The fact that a business plan may make provision for compensation to be paid to the non-consenting owner of the property for its use is surely indistinguishable from, and no more legally cognisable, than a provision of a business plan which purports to bind a non-consenting bank to make a loan to the company.

[49] That being the case, there is no reason to deny the owner a right to recover possession of its property if it has no desire to allow its retention by the company during business rescue proceedings.

CONCUSION

[50] In the result I conclude that the interpretation of s133 (1) of the Act which the applicant favours is insensible and unbusinesslike; and in the present context this latter consideration is of obvious significance. It treats creditors and owners of property possessed without right by the company unequally. The former are not obliged to assist the company any further whilst the latter would be obliged to do so by statutory injunction. The former have input into the design of the rescue plan, whilst there is no like provision empowering the latter to do so. Such an imbalance cannot have been intended and will in many cases result in an imbalance in the treatment of these different stakeholders in conflict with s 7(k) of the Act. The language used in the provision may well support both meanings I have explored above, but better supports the meaning attributed to the provision in *Madodza*.

[51] I conclude that the applicant is not entitled to an order preventing the enforcement of the order of this court made on 27 March 2015 because s 133(1) of the Act does not empower the court to grant such an order. That being the case there is no question of any other relief being granted, as the business plan is incapable of being implemented without the applicant acquiring a right to the vehicle in conflict with the order of this court of 27 March 2015.

IS THE FIRST RESPONDENT'S VOTE INAPPROPRIATE?

[52] Section 153(1)(a)(ii) permits a company in business rescue to apply to court to set aside a vote by a holder of a voting interest on the grounds that it was inappropriate. Section 153(7) allows the court to do that after having regard to the interests represented by the person who voted negatively; the provision, if any, made in the plan with respect to the interests of that person; and having regard to a fair and reasonable estimate of the return to that person if the company were to be liquidated. That relief is sought by the applicant, in addition to the interdict already discussed.

[53] It strikes me as appropriate to mention that if I had not reached the conclusion I have regarding the ambit of the moratorium with regard to property possessed by a company in business rescue, I would nevertheless have refused to alter the vote of the first respondent. I say that it appears appropriate to mention this because my principal reasons for adopting this view would have been very similar to the considerations which impel me to the conclusion that the first respondent is entitled to enforce this court's order of 27 March 2015.

[54] Whilst there are contradictions and inconsistencies in the business plan which ought reasonably to raise the eyebrows of any creditor asked to sanction it, what comes through clearly is that as a result of the cancellation of its agreement with the first respondent, the company to all intents and purposes has no capital. What is clear is that the business plan proposes to appropriate the vehicle in question as the company's capital.

[55] In my view the business plan, if approved and implemented, would have the effect of placing almost all of the risks with regard to the business venture, and indeed with regard to the first respondent's proprietary interests in the vehicle, on the first respondent.

[56] If s 133(1) of the Act does indeed forbid the enforcement of the first respondent's right to possession of the vehicle, it does not extinguish that right. (Neither, for that matter, does the moratorium create for the applicant the right to use, as opposed merely to possess, the vehicle. This is especially so bearing in mind that a vehicle is a thing the use of which causes wear and deterioration. Its use devalues the owner's proprietary right.)

[57] The business plan postulates the first respondent capitalising the company and for the achievement of that purpose being kept out of its lawful entitlement to possession of its property for over three years. The plan did not propose merely to compromise the first respondent's existing claim as a creditor, but sought to compel the first respondent to fund the company, and

against its will to submit to a regime of risks, and infringements of its own future rights represented by its proprietary interest in the vehicle. I cannot discern any basis upon which a court could burden the first respondent with these obligations against its will by declaring its vote “inappropriate”, and in effect thereby giving the plan the requisite approval.

The following order is made.

The application is dismissed with costs.

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OLSEN J

Date of Hearing:	TUESDAY, 07 JUNE 2016
Date of Judgment: :	FRIDAY, 22 JULY 2016
For the Applicant :	MR D PILLAY
Instructed by:	ZAYEED PARUK & ASSOCIATES APPLICANT'S ATTORNEYS SUITE 700, MANSION HOUSE 30 ALBERT STREET DURBAN (Ref.: Mr Z Paruk) (Tel No. 031 – 301 3405)
For the First Respondent:	MR J C VILJOEN
Instructed by:	STUPEL & BERMAN INCORPORATED FIRST RESPONDENT'S ATTORNEYS 70 LAMBERT STREET GERMISTON **c/o DUNN & ASSOCIATES** 12 JOE SLOVO STREET DURBAN (Ref.: LSD/cn/DS3060) (Tel.: 031 – 312 2211)